Supreme Court, U.S.
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No. 99-1045

In The

# Supreme Court of the United States

BEAR LODGE MULTIPLE USE ASSOCIATION, A Wyoming Non-profit Corporation; ANDY PETEFISH, d/b/a/ TOWER GUIDES; GARY ANDERSON, KENNETH D. ALLEN, GREGORY HAUBER, and WES BUSH, Individuals;

*Petitioners,*

v.

BRUCE BABBITT, Secretary of the Interior; ROBERT G. KENNEDY, Director of the National Park Service; KAREN WADE, Regional Director of the Rocky Mountain Region of the National Park Service; CHAS CARTWRIGHT, Superintendent of the Devils Tower National Monument; and the NATIONAL PARK SERVICE; CHEYENNE RIVER SIOUX TRIBE; ROMANUS BEAR STOPS, BURDELL BLUE ARM, ARVOL LOOKING HORSE, and STEVEN VANCE;

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

ARGUMENT ..... 1

I. THE UNITED STATES MISREPRESENTS THE QUESTION PRESENTED, THE NPS's ACTIONS, AND THE INJURIES SUFFERED BY BEAR LODGE, ITS MEMBERS, AND PETEFISH ..... 1

A. The United States Misrepresents the Question Presented ..... 1

B. The United States Misrepresents the NPS's Actions ..... 2

C. The United States Misrepresents Petitioners' Injuries ..... 3

D. The United States Misrepresents Andy Petefish's Injuries ..... 4

1. Petefish Suffered Economic Injury Due To The NPS Ban ..... 4

2. Petefish Is Directly Affected By The NPS Ban ..... 5

II. BEAR LODGE, *ET AL.*, BROUGHT THIS ACTION BASED ON *VALLEY FORGE* ..... 6

A. The Courts Below Were Required To Apply *Valley Forge* ..... 6

B. The Religious Display Cases Apply Here ..... 8

III. CONCLUSION ..... 10

## TABLE OF AUTHORITIES

Page

CASES

*County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) ..... 8, 9

*Allen v. Wright*, 468 U.S. 737 (1984) ..... 4

*City of Edmond v. Robinson*, 517 U.S. 201 (1996) ..... 10

*Engel v. Vitale*, 370 U.S. 421 (1962) ..... 8

*Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) ..... 9

*Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) ..... 3

*Leatherman v. Tarrant County*, 507 U.S. 163 (1993) ..... 6

*Lee v. Weisman*, 505 U.S. 577 (1992) ..... 2, 8

*Lujan v. Defenders of Wildlife*, 540 U.S. 555 (1992) ... 1, 6, 7

*Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) ..... 4, 9

*Metropolitan Life Insurance Co. v. Taylor*, 481 U.S 58 (1987) ..... 6

*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) ..... 5, 6, 7

*Warth v. Seldin*, 422 U.S. 490 (1975) ..... 3

*West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943) ..... 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Constitution, First Amendment, Establishment Clause ..... *passim*

OTHER AUTHORITY

Webster's Third New International Dictionary ..... 7

## ARGUMENT

### I. THE UNITED STATES MISREPRESENTS THE QUESTION PRESENTED, THE NPS'S ACTIONS, AND THE INJURIES SUFFERED BY BEAR LODGE, ITS MEMBERS, AND PETEFISH.

#### A. The United States Misrepresents the Question Presented.

Notwithstanding the United States' euphemistic mischaracterization of the actions of the National Park Service (NPS), the undisputed facts demonstrate that the NPS adopted a far-reaching program, supported by massive media and public relations efforts, to achieve one end: the total elimination of June climbing at Devils Tower in support of the belief of Native Americans that Devils Tower is sacred. Thus, the question presented is whether climbers "directly affected" by the NPS's abandonment of neutrality at Devils Tower, including those coerced into not climbing, have standing to challenge that violation of the Establishment Clause.[1] Moreover, because the United States argues (Govt. 8-9) that the Establishment Clause jurisprudence of this Court and the Courts of Appeals has been all but overturned by *Lujan v. Defenders of Wildlife*, 540 U.S. 555 (1992), this Court should grant this petition to address the issue of standing in Establishment Clause cases.

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[1] Contrary to the United States' argument (Govt. at 14), this petition presents the question whether federal lands may be closed to the public because they are "sacred." If the array of users of Devils Tower represented here do not have standing to challenge the actions of the NPS, then no one has standing and all federal land managers may, without fear of challenge, adopt the very coercive policies adopted by the NPS at Devils Tower.

**B. The United States Misrepresents the NPS's Actions.**

The United States argues that the June Climbing Ban is a "purely voluntary plan" (Govt. 6) to ensure that climbers "show respect for Native American" religion (Govt. 4) by "request[ing]" that petitioners not climb Devils Tower in June (Govt. at 9). This is erroneous.

The NPS admits that its June Climbing Ban will force climbers to show "respect" for Native American religion (Petn. 4); the United States admits that the NPS intends to "teach respect" for that religion. (Govt. 3) Obviously, the June Climbing Ban conflicts with the holdings of this Court regarding the use of social pressure. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 578 (1992). Not surprisingly, the United States fails to discuss this and other cases.

Moreover, the NPS's actions are clearly coercive and run afoul of the holdings of this Court that religious coercion violates the Establishment Clause.[2] *See, e.g., Lee*, 505 U.S. 577. As the District Court concluded, "a complete elimination of climbing from the Tower in June would serve as powerful evidence of actual coercion." (App. at 59, Nt. 7). The NPS has nearly achieved that result: June climbers fell from 6,000 climbers in 1994 to less than 200 in 1999, a 97 percent decrease. The United States' argument that the near elimination of June climbing is the result of voluntary, individual decisions by

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[2] The United States has no response to petitioners' argument that the public must take seriously statements made and documents signed by officials of the United States that those officials will take specific action in the absence of the desired response of the public. (Govt. at 7). Intervenors misrepresent the record by arguing that only one of the NPS alternatives would have resulted in mandatory closure of Devils Tower. (Intv. at 13). Three of the six alternatives would have closed Devils Tower to all climbing. (App. 77).

thousands of climbers to show "respect" for Native American religion is laughable.[3]

### C. The United States Misrepresents Petitioners' Injuries.

The United States argues that Bear Lodge and its members are merely "concerned bystanders" (Govt. at 6). This argument is patently absurd; Bear Lodge, *et al.*, have the required "personal stake" in this action.[4]

Bear Lodge, *et al.* have been involved for years in the NPS's management of Devils Tower. Not only have they climbed Devils Tower on a regular basis, but also they have taken the lead in challenging the NPS's efforts to impose a religion-based June Climbing Ban. Bear Lodge members live nearby, regularly visit, and use Devils Tower, and are the targets of the coercive June Climbing Ban. (App. 7, 85, 87) They have precisely the "personal stake" that this Court has identified as necessary for standing and for distinguishing Bear Lodge, *et al.*, from mere "bystanders." *See Warth v. Seldin*, 422 U.S. 490, 498 (1975).

The United States has failed to discuss the holdings of this Court regarding standing in Establishment Clause

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[3] The record demonstrates that the climbers showed "respect" only for the ability of the NPS to close a federal facility to public access and deny climbers the ability to climb Devils Tower. App. 85-88. Constitutionally, there is no distinction between the federal government "teach[ing]" its citizens to "respect" a religion and compelling its citizens to show "respect" for a religion by engaging in religious orthodoxy.

[4] The United States argues, without persuasive authority, that Bear Lodge does not have standing to represent its members. (Govt. at 11). The Tenth Circuit did not reach such a holding nor would such a holding have found support in this Court's test for associational standing. *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977). So long as any member has individual standing, the association itself has standing. Those Bear Lodge members coerced into not climbing may be represented by Bear Lodge. (App. 85-88).

causes, let alone set forth why the holding of the Tenth Circuit in the instant case is not in true, direct, intolerable, and irreconcilable conflict with those holdings.[5] As a result, the petition should be granted to address this conflict.

### D. The United States Misrepresents Andy Petefish's Injuries.

#### 1. Petefish Suffered Economic Injury Due To The NPS Ban.

Contrary to the claims of the United States (Govt. at 7, Nt. 2) and Intervenors (Intv. at 10) the District Court held, "Plaintiffs in this case have established a substantial likelihood of success on the merits. . . . " (App. 38-39). Obviously, a requirement for that holding is an injury that supports standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Furthermore, the District Court held, not that Petefish had suffered no economic injuries, but only that his past economic losses were small. (App. 38, Nt. 8).[6] Petefish's economic injury supports standing.[7]

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[5] The United States argues that Bear Lodge members object to the NPS's June Climbing Ban because it mandates that Native Americans engage in their religion in private. (Govt. at 10). By that statement, the United States admits to a cognizable injury under the Establishment Clause. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (forbidding the "exclu[sion] of all human activities but [that of Native Americans] from sacred areas of the public lands.") Likewise wanting is the United States' assertion that Bear Lodge, *et al.*, object to interference with their "opportunity to engage in recreational rock climbing." (Govt. at 10). Bear Lodge, *et al.*, object to being denied the ability to use public land because of their religion. (Petn. 8-16).

[6] The District Court found unproven only Petefish's anticipated future losses. App. 39, Nt. 8.

[7] "The Constitution draws no distinction between injuries that are large, and those that are comparatively small. The line

Significantly, the United States did not attempt to refute the irrefutable fact that a 97 percent decrease in June climbing caused a loss of business for Petefish. Thus, the holding of the Tenth Circuit as to Petefish's standing is in conflict with the holdings of this Court and the Courts of Appeals. This Court should grant this petition to address this conflict.

### 2. Petefish Is Directly Affected by the NPS Ban.

Petefish's injuries are not limited to economic ones. (Petn. 14). As a summer resident of the Devils Tower area, as a daily climber of Devils Tower during the summer, as a participant in the process by which the NPS adopted the religion-based June Climbing Ban, Petefish is directly affected by the NPS's abandonment of religious neutrality at Devils Tower.

Moreover, because he provides commercial climbing tours at Devils Tower, Petefish is directly affected because of the extensive effort undertaken by the NPS and its employees (some of whom are armed) to persuade would-be climbers not to climb. As a result, Petefish expends tremendous effort attempting to persuade would-be climbers that they have a right to climb, notwithstanding the efforts of NPS officials to end all climbing. As the 97 percent drop in June climbing demonstrates, Petefish has been unsuccessful.

Because Petefish has been directly affected by the NPS's actions at Devils Tower, under the decisions of this Court and the majority of the Courts of Appeals, he has standing to challenge the religion-based June Climbing Ban. The holding of the Tenth Circuit to the contrary is in true, direct, intolerable, and irreconcilable conflict with

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between more dollars and less is no valid constitutional measure." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 496 (1982) (Brennan, dissenting).

those holdings. This Court should grant this petition the address this conflict.

## II. BEAR LODGE, *ET AL.*, BROUGHT THIS ACTION BASED ON *VALLEY FORGE.*

### A. The Courts Below Were Required To Apply *Valley Forge*.

The United States argues that Bear Lodge, *et al.*, may not use the "directly affected" test of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), because the words "directly affected," which the United States regards as magic words, were "neither asserted in petitioners' complaint nor raised before the court of appeal." (Govt. at 8). The United States is in error both as to the law and the facts.

Bear Lodge, *et al.*, were not required to use magic words such as "directly affected" in their Complaint. Notice pleading requires only "a short plain statement of the claim" to give "fair notice of what the complaint is and the grounds upon which it rests." *Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993). Such statement need only demonstrate a federal question; that is, a controversy "arising under the Constitution, laws, or treaties of the United States." *Metropolitan Life Ins. Co., v. Taylor*, 481 U.S. 58, 63 (1987). In their Complaint, Bear Lodge, *et al.*, alleged that they were affected by the NPS's management of federal lands contrary to the Establishment Clause. (Cmpl., ¶¶ 1-6, 21, 23-36). Thus, *Valley Forge* applies.

Second, before the District Court, the United States never challenged Bear Lodge's standing to bring an Establishment Clause claim. Indeed, the District Court recognized Bear Lodge, *et al.*'s standing under *Lujan*. Opinion of April 2, 1998, at 9.

Third, for the first time in its brief at the Tenth Circuit, the United States asserted that Bear Lodge, *et al.*, did not have standing. However, the argument of the United States was a narrow one: that this Court's holding

in *Lujan* had all but overturned its holdings in Establishment Clause cases. (Response, at 16-18.) Bear Lodge, *et al.*, responded to those arguments.[8] (Reply, 5-8). Moreover, during oral arguments before the Tenth Circuit, Bear Lodge, *et al.*, addressed the manner in which they were directly affected by the religion-based June Climbing Ban.[9] Finally, in their petition for rehearing *en banc*, Bear Lodge, *et al.*, drew the Tenth Circuit's attention to the panel's misapprehension of the holdings of this Court in *Valley Forge* and related cases.

It is disingenuous for the United States to assert that, until the filing of the instant petition, neither it nor the courts below were aware of the applicability of this Court's holding in *Valley Forge* and related cases. Furthermore, it is ridiculous for the United States to argue that *Valley Forge* does not apply to this case. That is especially so because those raising the instant Establishment Clause challenge included: climbers who were subjected to NPS

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[8] In their Reply Brief, Bear Lodge, *et al.*, identified several injuries suffered by all Bear Lodge members including: (i) the coercive pressure created by the NPS's policies, in response to which several members ceased climbing, (ii) the fact that Bear Lodge members were forced to show "respectful deference" to sacred objects and activities; (iii) the fact that, as non-believers, Bear Lodge members were prohibited from climbing, and (iv) the economic injuries suffered by Petefish. (Reply 6-8). Obviously, the argument of the United States (Govt. at 11) that Bear Lodge, *et al.*, did not allege that they had come into contact with constitutionally offensive government displays is in error.

[9] In their Reply Brief before the Tenth Circuit, Bear Lodge, *et al.*, stated that they were injured constitutionally (in the language of this Court in *Valley Forge*, "directly affected") because they were subject to coercion by the NPS. (Webster's Third New International Dictionary defines coercion as "the act of coercing: use of physical or moral force to compel to act or assent . . . .") It is the act of coercion that "directly affect[s]" Bear Lodge members pursuant to *Valley Forge* and related cases, whether or not they "act[ed] or assent[ed]" to the coercion.

coercion not to climb,[10] some of whom unwillingly assented to that coercion,[11] and some of whom did not, but all of whom were subjected to the public ridicule orchestrated by the NPS;[12] and a climbing guide who was singled out for public ridicule for his failure to adhere to the religious orthodoxy adopted by the NPS,[13] and who lost business as a result of the NPS religion-based June Climbing Ban.

### B. The Religious Display Cases Apply Here.

The United States argues that Bear Lodge, *et al.*, may not cite to or rely on, for example, *Allegheny County v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), because Bear Lodge, *et al.*, did not allege that they had been injured by "coming into contact with allegedly offensive religious displays on government property." (Govt. 10-11). This argument has no merit.

First, modern pleading rules abandon archaic adherence to the rote ritual repetition of magic words and phrases. The United States and the NPS were on notice from the filing of the Complaint of the action being challenged by Bear Lodge, *et al.*, and what holdings of this Court and other courts applied to that challenge.

Second, Bear Lodge, *et al.*, cites *Allegheny* and other such cases because they identify the subtle nature of the injury that permits standing in Establishment Clause litigation. *See cases cited at* Petn 17-18. These holdings demonstrate that Bear Lodge, *et al.*, were "directly affected" in a manner far more tangible or "discernable," to use the

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[10] *See Engle v. Vitale*, 360 U.S., at 431.

[11] *See West Virginia State Bd. Of Education v. Barnette*, 319 U.S. 624 (1943).

[12] *See Lee v. Weisman*, 505 U.S., at 578.

[13] *Id.*, at 592 (holding that the government may no more use indirect pressure "to enforce orthodoxy than it may use direct means.")

United States' term (Govt. at 9), than any of the plaintiffs in those case, all of whom were accorded standing.[14]

Third, this case is directly analogous to the religious display cases and those cases are applicable here. The only favorable distinction the United States might draw between this case and religious display cases is that here the NPS did not take any action authorizing the presence of the religious symbol on public land. However, in a manner far more constitutionally egregious than the factual pattern in analogous religious display cases, the NPS not only endorsed the religious significance ascribed by the religious group to the symbol, but adopted the religious orthodoxy ascribed to the symbol by the group when it denied non-members of the religious group access to public land on which the symbol is located. As a result, this petition presents the worst of the Establishment Clause violations set forth in both *Lyng* and *Allegheny*.

Consistent with holdings of this Court and the Courts of Appeals, Bear Lodge, *et al.*, have standing to challenge the NPS's religion-based June Climbing Ban at Devils Tower.[15] Thus, the holding of the Tenth Circuit is

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[14] Under *Valley Forge*, the injury in fact standard is met whenever a plaintiff is "directly affected." Contrary to the United States' arguments (Govt. 9), this Court never limited that test to situations where the plaintiff was subject to "unwelcome religious exercise" or was forced to "assume special burdens." As subsequent case law has demonstrated, these two scenarios are not the exclusive means by which an Establishment Clause plaintiff is directly affected. *See, e.g., Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990).

[15] Under the holdings of this Court and the majority of the Courts of Appeals, Bear Lodge, *et al.*, have standing. However, because the Seventh Circuit, and now apparently the Tenth Circuit, demand a change in behavior for standing in Establishment Clause cases, only the coerced, non-climbing Bear Lodge members would have standing. This is the serious

in true, direct, intolerable, and irreconcilable conflict with those holdings. This Court should grant this petition to address this conflict.[16]

## III. CONCLUSION

The NPS has abandoned neutrality in its management of Devils Tower in violation of the Establishment Clause and in the process directly affected Bear Lodge, its members, and Andy Petefish, such that those parties have standing to challenge the NPS's unconstitutional actions. The Tenth Circuit's holding to the contrary is in true, direct, intolerable, and irreconcilable conflict with the holdings of this Court and other Courts of Appeals. Moreover, the holding of the Tenth Circuit as to some Bear Lodge members demonstrates a growing split in the Circuits that must be addressed by this Court. This Court must grant this petition to address these conflicts.

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split in the Circuits recognized by this Court in *City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissenting from the failure to grant *certiorari*). The argument of the United States (at 11) that there is no split in the Circuits on this issue is without merit. This petition should be granted to address this split.

[16] Other arguments raised by the United States and Intervenors go to the merits and are thus irrelevant to standing and to the granting of this petition.